2014 WL 3853498 (La.App. 5 Cir.) (Appellate Brief)
Court of Appeal of Louisiana, Fifth Circuit.

Salvadore TRAMUTA and Joan M. Tramuta, Plaintiffs - Appellants,
v.
Lakeside PLAZA, L.L.C., Robert A. Caplan, and XYZ Insurance Company, Defendants - Appellees.

No. 14-CA-410.
July 30, 2014.

On Appeal From the 24th Judicial District Court for the Parish of Jefferson,
State of Louisiana No. 668-923 Division “G” Honorable Robert A. Pitre, Jr.

Brief on Behalf of Plaintiffs

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Judgment Rendered: April 7, 2014

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***iii** II. *TABLE OF AUTHORITIES*

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***iv** III. *STATEMENT OF JURISDICTION*

The supervisory jurisdiction of this Court is invoked pursuant to Article I, Section 22, and Article 5, Section 10, of the Louisiana Constitution of 1974, Louisiana Code of Civil Procedure Article 2201, and Rule 4 of the Uniform Rules of the Louisiana Courts of Appeal.

***1** IV. *STATEMENT OF THE CASE*

A. *Procedural History*

Petition for Damages was filed in this personal injury matter on January 23, 2009 (Tr. Pg. 14).

Appellee filed a *Motion for Summary Judgment* on March 28, 2011 (Tr. Pg. 53). The Trial Court heard Appellee's *Motion for Summary Judgment* on June 13, 2012 and issued a Judgment denying the summary judgment on June 29, 2012 (Tr. Pg. 157). Writs were taken by Appellees and were denied on August 1, 2012 (Tr. Pgs. 162-163).

Defendant then changed counsel and new counsel filed the same *Motion for Summary Judgment* (Tr. Pg. 298), citing different cases but arguing the same issues and same evidence present in the first *Motion for Summary Judgment* (Tr. Pg. 53) previously denied by the Court on June 29, 2012. Appellants responded by filing a *Motion to Strike and/or Quash Defendants' Second Motion for Summary Judgment on Basis of Doctrine Law of the Case and Redundancy, and Alternatively, Plaintiffs' Memorandum in Opposition to Defendants' Second Motion for Summary Judgment* (Tr. Pg. 321).

The motion to strike and motion for summary judgment were heard on January 15, 2014. The Court thereon issued Judgment in Appellee's favor dismissing Appellants' case. The Judgment was signed on February 10, 2014 (Tr. Pg. 427).

Appellants on February 12, 2014 filed Request for Written Reasons (Tr. Pg. 428). This occurred two days after the Court signed the Judgment.

JUDGMENT VOIDED

While waiting for written reasons, the trial court reversed its Judgment of February 10, 2014 and on February 27, 2014 the Court vacated its Judgment of ***2** February 10, 2014 (Tr. Pg. 432).

WRITTEN REASONS

On March 14, 2014 the Court issued written reasons for judgment (Tr. Pg. 446). In this six page document the Court states it research finding and reasons for reversal and for vacating its judgment of February 12, 2014.

On March 10, 2014 Appellee filed *Exparte Motion for Nullity and Motion to Strike* regarding the Trial Court's Judgment of February 27, 2014, where the Court reversed its error (Tr. Pg. 433). On the same day Appellee filed a *Notice of Intent to Apply for Supervisory Writs* (Tr. Pg. 443).

On March 19, 2014 Appellants filed *Plaintiffs' Memorandum Opposition to Defendant's Exparte Motion for Nullity and Motion to Strike*, regarding the Trial Court's Judgment and written reasons (Tr. Pg. 454).

On April 7, 2014 the Trial Court issued Judgment pursuant to Appellee's *Motion for Nullity*, again Appellants' case was dismissed (Tr. Pg. 476). No written reasons were rendered.

On April 14, 2014 Appellant filed a Motion and Order for Appeal (Tr. Pg. 478).

Appellants' appeal contending that the Trial Courts' reversal of its error and issuing Judgment to vacate after Appellants' timely requested written reasons should stand. Appellants also contend on appeal that the Trial Court' s Reasons for Judgment (Tr. Pg. 446), the research, and argument therein is evidentially basis to reverse and to remand the matter for trial.

Appellants, as this Court will see infra, adopt in toto the Trial Court's well written Reasons for Judgment (Tr. Pg. 446) in seek of a reversal of this matter.

3 *THE ACCIDENT

On January 30, 2008, Plaintiff exited a men's clothing store, Jeff's Haberdashery located at Lakeside Plaza, carrying clothing. Upon stepping down to exit the foyer, Plaintiffs foot got stuck between the running step and parking bumpers, causing Plaintiff to fall and land on his face and head, suffering broken jaw, eye damage, broken teeth, cranial and brain damage. Plaintiff suffered severe crippling injuries as a result, and is still suffering from subject injuries. Plaintiff has incurred over $300,000.00 in medical bills. At time of accident and presently, Plaintiff owns an insurance agency, and has not returned to work since accident.

A 285 foot long step and new ingress and egress was added shortly before the accident. Before the step was added there were two and a half feet of space to step (code), between parking bumpers and the foyer. However, the new 120 foot step left only 11” for room to step. The contractor testified the center owner said it was too expensive to move the parking bumpers to allow the same space as before. [1] Thus, a not so clear hazzard is knowingly created.

Discovery was done by each party. Depositions were taken of Plaintiff, Defendants, witnesses, Plaintiffs' experts and Defendants' experts. Expert reports were submitted by all parties. This matter was ready for trial [2].

On March 28, 2011, Defendants filed *Motion for Summary Judgment* (Tr. Pg. 53), averring Plaintiffs could not sustain a cause of action, citing case law and *La. C. C.P. Arts. 966* and *967*.

***4** To support their argument, Defendants argued that Plaintiff knew the accident scene, and had been to the store where on three occasions, before he fell, and that the running step Plaintiff fell from and the parking bumpers were clearly visible; that the risk was not unreasonable; that the hazzard was clear and visible and should have been seen. Defendants' further argued there was no genuine issue of fact, and quoted testimony from their expert along with photographs and supporting case law.

Plaintiffs' responded in opposition on May 9, 2012. Plaintiff addressed all issues presented above. On June 29, 2012 this Honorable Court issued *Judgment* denying Defendants *Motion for Summary Judgment* (Tr. Pg. 157).

APPEAL IS TAKEN BY APPELLEE - DENIED

On July 10, 2012, Defendants appealed to the Fifth Circuit Court of Appeals. On August 1, 2012, the Fifth Circuit Court of Appeals denied Defendants *Writ.* Defendants did not appeal this judgment, or ask for a rehearing (Tr. Pg. 162).

NEW COUNSEL'S REPETITIVE MOTION

After this denial, Defendants secured new counsel. New counsel for Defendants, then filed the same *Motion for Summary Judgment* (Tr. Pg. 298), contending the same redundant arguments based upon same identical evidence, witnesses, photographs, law and deposition testimony. Previously ruled upon by the Court in its Judgment from the previous Motion for Summary Judgment.

There is no difference between the first motion and the second motion, or the arguments of law in both. Defendants cite different case laws, but the cases are on the same identical issues of fact and code articles previously argued in their first motion and dismissed by Judgment.

A. *ORIGINAL CONSTRUCTION AND DESIGN*

Defendant, Lakeside Plaza, LLC (hereinafter referred to as "Lakeside") is a ***5** strip shopping mall that was *built in the 1970's.* It houses a number of retail shops, including Morning Call on one end of the strip mall and Jeff's Haberdashery on the other end. The shopping center, as can be seen by photographs, has an egress and ingress, at both ends of the walkway foyer, that runs the length of the strip shopping mall foyer with railings on both ends. Parking bumpers were placed in the parking area, along the walkway of the strip mall when originally built.

B. *CHANGES MADE AFTER KATRINA AND SUBJECT OF THIS LITIGATION CREATING THE HAZZARD*

After Hurricane Katrina, Defendant, Lakeside, through it's real estate agent, Defendant, Latter and Blum, decided to change the design, and to have a 285 linear foot concrete running step constructed that would extend the entire length of the foyer, into the parking area, along the parking bumpers [3], as can be seen by photographs. This change would nullify the space to step between the parking bumpers and the foyer from 36 inches (36") to eleven inches (11").

The addition of 285 linear ft., running step, is subject of this litigation. The addition allows and invites shoppers to walk up or walk down to and from the strip mall to the parking area, from any point on the running step. and exit the foyer at any location from the parking area, instead of the designated areas at the ends of the foyer, as was designated before the newly constructed running step.

Defendant Latter and Blum, in adding the new 285 linear foot ingress and egress running step, acted as general contractor, and were responsible for obtaining permits and design of step, in conformity with parish and state codes and ordinances. In testimony of Appellee's contractor, Andrew Allen of Pre-Cast Concrete Step Company, Inc., Mr. Allen testifies that permits were never secured by him or anybody ***6** else, through the Parish, State or any other entity. The Defendants admit they failed to secure permits of any kind.

On July 12, 2005, Mr. Allen submitted second bid for $5,900.00, for construction of the 285 linear foot running step, with step height at 6-8" and depth approximately 14", along with bid of $250.00, to paint the face of the step yellow, to warn consumers (Tr. Pg. 89, 351, and 352).

The installation of the running step would reduce the landing step area between the landing and the parking bumpers from the standard thirty-six inches (36") to eleven inches (11"). [4] Mr. Allen wanted to move the parking bumpers back to allow and to meet the standard safety code of thirty-six (36") inches of landing space.

As noted from Mr. Allen's testimony, Defendant, Latter and Blum rejected the bid to paint the face of the step yellow and did not want to incur the extra cost of moving the parking bumpers back, and again asked for a price reduction, as the property owner did not want to incur that much cost.

Defendant, Latter and Blum, thereon, requested another bid, reducing the linear footage to 285 linear ft., with step height to a constant 5" and depth approximately 13". Pre-Cast Concrete Step Company, Inc. (Mr. Allen), as instructed by Latter and Blum, submits a third bid on July 20, 2005, reducing the linear footage to 285 linear ft., with step height to a constant 5" and depth approximately 13", with no painting of the face of the running step to warn consumers, or providing for moving the parking bumpers back for allowance of safe landing when stepping from the running step. The final bid was reduced from $7,925.00 to $4,916.00 (Tr. Pgs. 89, 351, and 352).

7 C. *DEFENDANTS WILL NOT ACCEPT ADVICE OF CONTRACTOR TO CONFORM TO THE ASTM F1637 (STANDARD PRACTICE FOR SAFE WALKING SURFACES) TO ALLOW FOR INSTALLATION OF RUNNING STEP

In planning the new 285 linear foot running step, the running step would then extend to width of eleven (11") inches. Mr. Allen, in his deposition, testified, that with the addition of the step, the distance between the step landing and the parking bumpers was reduced from 36" to 11". When queried as to why the parking bumpers were not moved back to provide and keep a landing area of 36", Mr. Allen testified, that he had verbal conversations with Latter and Blum, in regards to moving the parking bumpers and that, "I was told the owner didn't want to spend anymore money.":

> "...I recall that there was - - I believe I recommended to Jeff that he may want to move those out further, but I was told the owner didn't want to spend any more money." [5]

(Tr. Pgs. 89, 351, and 352)

The concrete parking bumpers originally installed, were not relocated or extended further after the running step was constructed, leaving only 11" of step down landing space. This has caused numerous accidents to shoppers, including Plaintiff. As a result of the faulty running step construction, shoppers are forced to step between the running step and parking bumpers.

The distance between the newly constructed running step and the parking bumpers is eleven (11") inches. Thus, any person choosing to exit the foyer by stepping between the running step and parking bumper would snag their foot or get their foot jammed between the running step and parking bumper. A shopper(s) carrying packages, would have his/her view obstructed, causing greater risks of ***8** injuries, when attempting to step onto the 1" landing or jumping or stepping over the parking bumpers, which were not relocated, as required by the standard.

Plaintiffs secured an expert in the area of safety, Michael J. Frenzel, BS, MA, of Associated Safety Consultants, Inc. Mr. Frenzel makes the following findings, and renders same in his expert report (Tr. Pgs. 350-351). Mr. Frenzel's findings, in short:
1. "There is a normal and correct expectation that there will be a 'clear' landing space at the bottom of the steps, even when that space is the surface of a parking lot. In this case, the wheel stops encroached on and obstructed that 'clear' landing space. There was insufficient space for a man's size 11 1/2 shoe to fit perpendicularly between the first riser and the base of the wheel stop." [6] (Emphasis mine)

2. “I disagree that there were no violations of code or standards. There was no clear landing area at the base of the steps.” (Emphasis mine)
3. “There was no attempt to funnel, channel or limit the use of the steps to the area between the wheel stops.”

4. “The space between the wheel stops was less than 36 inches required by the standard.”

5. “The MUTCD requires that parking stall lines be painted with white paint. In this case, the parking stall lines were painted with traffic yellow, as where the wheel stops. However, the indiscriminate use of yellow paint to mark parking lots diminishes the value of the color as a warning.”

6. “Wheel stops are required to be in contrast with their surroundings. As in this case, the wheel stops at the head of the parking stall is the same color yellow used to stripe the lot.”

7. “In a quick examination of a vacant parking stall, it is possible to mistake the yellow wheel stop as a yellow ‘stop line’ used to further define the parking stall.”

8. “If a permit would have been obtained, it is likely ***9** that the code violations, and unsafe condition created by the step and the step/wheel stop would have been detected and corrected.”

D. ***TESTIMONY OF GAYLE TERRELLOWNER OF RETAIL STORE, LAZYBUG, WHICH IS LOCATED ON LAKESIDE PLAZA'S PREMISES***

Since this Court ruled on Defendants first summary judgment motion, Defendants have taken the deposition of tenant, Gayle Terrell. The tenant, Ms. Terrell testified the same as Plaintiffs expert, Mr. Frenzel, that there is no space to step when stepping off running step. Accidents have occurred as a result.[7]

Ms. Terrell testified that the installation of the new running step was causing safety problems for herself and patrons of her retail store, Lazybug, stating that there was not enough space between the new running step and the parking bumpers to land on:
A: And it was always a problem because the embankment was was in front of the outside walkway to the store and it was not enough depth for the average feet to fit there. You had to turn your foot sideways which could, in fact, make you twist.

(Tr. Pgs. 346-349)

After the installation of the running step, numerous accidents have occurred, involving the running step and the parking bumpers. Gayle Terrell testified that in 2007, she witnessed an accident where a gentleman fell by the parking bumper, in process of stepping down between the running step and parking bumpers. Ms. Terrell witness a second accident in 2009, where a woman fell when stepping down to landing area between the running step and parking bumpers[8] :

A: ... so it had to be something either with her step ***10** down. The problem with that center is when you take the step down, there's not enough depth between the bumper and the step to get your foot in there.
(Tr. Pgs. 346-349)

E. ***LAZYBUG WARNS ITS CUSTOMERS AND ASSISTS THEM DOWN THE RUNNING STEP***

Q: One question. I have concerns. Do you ever tell your customers to be careful out there going down the steps?

A: I just say there's a step. We have to beware. We'll help you. I try to avoid negative. But I have to warn them because I don't want another fall.

(Tr. Pgs. 346-349)

F. ***DEPOSITION OF ROBERT BONNAFFONS, AFTER THIS COURT DENIED DEFENDANTS' FIRST SUMMARY JUDGMENT MOTION, AND NOW DEFENDANTS SEEK TO EXCLUDE HIS TESTIMONY BY MOTION IN LIMINE***

Defendants' take the deposition of Robert Bonnaffons after the Court denied Defendants first *Motion for Summary Judgment.* Mr. Bonnaffons is an attorney who witnessed an accident on the same running step, subject of this litigation. This is a different accident, on the same premises, at the same running step, subject of this litigation, from the other accidents that Ms. Terrell saw, or the subject accident at Bar. Mr. Bonnaffons is key witness to another accident involving the steps. [9]

V. ***ASSIGNMENTS OF ERRORS***

1. The Trial Court erred by granting Appellee's Motion for Summary Judgment when there are still issues as to material facts.
2. The Trial Court erred in dismissing this matter when there are issues of material fact which must be decided by a jury during a trial on the ***11** merits.

3. The Trial Court erred by not finding that the Motion for Summary Judgment was redundant.

4. The Trial Court erred by reversing its decision denying the Motion for Summary Judgment.

VI. *ISSUES FOR REVIEW*

1. Can/will the Fourth Circuit Court of Appeal accept the Trial Court's reasons for judgment and find, as the Trial Court did, that there are material facts that must be denied by a Jury?

2. The second motion for summary judgment filed by Appellees was redundant and the Trial Judge was not in error by denying the motion.

3. Sworn testimony submitted to the Trial Court clearly showing material facts the Trial Court referred to in part in its reasons for judgment.

4. Can a Trial Court reverse its error as occurred in this matter, after discovering the error when Appellants filed a request for written reasons?

5. Did Appellee waive argument regarding Trial Court's jurisdiction by filing motion in Trial Court to strike rather than pursue on appeal?

VII. *STATEMENT OF FACTS*

Petition for Damages was filed on January 23, 2009 (Tr. Pg. 14)

First *Motion for Summary Judgment* was filed on March 28,2011 (Tr. Pg. 53)

Judgment on *Motion for Summary Judgment* was issued on June 29,2012 (Tr. Pg. 157)

Appellee's Notice of Intent to Apply was filed on July 5, 2012 (Tr. Pg. 158)

Application for Writ No. 12-C-555 was filed on August 2, 2012 (Tr. Pg. 162)

Writ not considered as of August 1, 2012 (Tr. Pg. 163)

***12** Defendant's *Second Motion for Summary Judgment* was filed on October 16, 2013 (Tr. Pg. 298)

Plaintiffs *Motion to Strike and/or Quash Defendants' Second Motion for Summary Judgment on Basis of Doctrine Law of the Case and Redundancy, and Alternatively, Plaintiffs' Memorandum in Opposition to Defendants' Second Motion for Summary Judgment* was filed on January 2, 2014 (Tr. Pg. 321-324)

Judgment on Defendants *Second Motion for Summary Judgment* was filed on February 10, 2014 (Tr. Pg. 427)

Plaintiff filed *Request for Written Reasons* on February 12, 2014 (Tr. Pg. 428)

Notice of Signing Judgment was filed on February 12, 2014 (Tr. Pg. 430)

Order vacating the February 12, 2014 Judgment was filed on February 27, 2014 (Tr. Pg. 432)

Exparte Motion for Nullity and Motion to Strike was filed on March 10, 2014 (Tr. Pg. 433) and Memorandum in Support (Tr. Pg. 437)

Notice of Intention to Apply for Supervisory Writs was filed on March 10,2014 (Tr. Pg. 443)

Reasons for Judgment was filed on March 14, 2014 (Tr. Pg. 446)

Judgment on Defendant's Motion to Strike was filed on April 7, 2014 (Tr. Pg. 476)

Motion and Order for Appeal was filed on April 14, 2014 (Tr. Pg. 478)

VIII. *SUMMARY OF THE ARGUMENT*

The Trial Court denied Appellee's Motion for Summary Judgment on two occasions. The Trial Court issued Reasons for Judgment denying the second motion for summary judgment, subject of this appeal (Tr. Pg. 446). The findings as stated by the Trial Court and the case law cited by the Court have to be accepted. The facts and testimony never changed whether the Trial Court could correct its error before the appeal or whether this Court now has to correct the error is before this Court.

***13** ARGUMENT ON ISSUE FOR REVIEW NO. 1:

CAN/WILL THE FOURTH CIRCUIT COURT OF APPEAL ACCEPT THE TRIAL COURT'S REASONS FOR JUDGMENT AND FIND, AS THE TRIAL COURT DID, THAT THERE ARE MATERIAL FACTS THAT MUST BE DENIED BY A JURY?

The Trial Court on its motion nullified the judgment on the second motion for summary judgment. It will be assumed this Court will review the same documents and testimony the Trial Court relied upon in nullifying the judgment. Appellants cannot state their argument better and certainly cannot provide the research and argument at the knowledgeable level of the trial judge. For this reason

Appellants adopt as argument on this issue the trial court's reasons for judgment in toto for its argument on this issue:

REASONS FOR JUDGMENT

Filed in Division G of this Court in Case No: 668-923 was a Motion for Summary Judgment filed by defendants Lakeside Plaza, L.L.C., Latter and Blum Property Management, and Allstate insurance Company. After a hearing on January 15, 2014, this Court granted the motion, and a judgment was entered into the record on February 10, 2014. On February 18, 2014, a Request for Written Reasons for Judgment was filed by the plaintiffs. After a further review of the record, exhibits, and applicable laws, this Court found that there were still lingering issues of material fact. As a result, on February 27, 2014, this Court issued an order vacating the previous summary judgment. This order, in effect, rendered the plaintiffs' original Request for Written Reasons for Judgment moot; however, this Court, *sua sponte*, offers written reasons for vacating the summary judgment, in accordance with La. C.C.P. art. 966(B)2.

In this case, the plaintiffs are suing for damages that they claim resulted from an incident on January 30, 2008. On that day, plaintiff Salvadore Tramuta shopped at Jeff's Haberdashery in the Lakeside Plaza shopping center. As he was exiting the store and approaching his car, he tripped and fell forward onto his face, suffering injuries which he describes as “crippling and disabling.” Mr. Tramuta argues that his injuries were the result of the defendants' negligence in designing and constructing the running step between the front of the shopping center and the parking bumpers in the adjacent ***14** parking lot. Plaintiff Joan Tramuta, Salvatore Tramuta's wife, also asserts a loss of consortium claim in conjunction with the injuries claimed by Mr. Tramuta.

Summary judgment is appropriate only when “the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law.” La. C.C.P. art 966(B)2. If the mover will not bear the burden of proof at trial, he needs only to show that there is an absence of proof on one or more of the elements of the adverse party's claim. Once the mover has established that there is no support for one or more elements of the claim, the burden shifts back to the adverse party to show that there is evidentiary support for each element of the claim. If the adverse party cannot do so, the mover is entitled to summary judgment.

The Motion for Summary Judgment at issue here was filed by the defendants, who do not bear the burden of proof at trial. As such, to succeed on their motion, the defendants must show that there is an absence of factual support for one or more elements on the plaintiffs' claims. In the instant case, the plaintiffs have asserted claims based on a premises liability theory. The applicable law for such claims is discussed below.

Louisiana Civil Code Article 2317 provides:

We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications.

The specific modification for negligence claims against building owners is found in Article 2322 of the Louisiana Civil Code. Article 2322 provides:

The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by **neglect** to repair it, or when it is the result of a vice or defect it its original construction. However, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care...

In *Broussard v. State ex rel. Office of State Bldgs.*, 12-1238 (La. 4/5/13); 113 So. 3d 175, 182-183, the Supreme Court of Louisiana explained:

Under Article 2322, a plaintiff must prove the following elements to hold the owner of a building liable for the damages caused by the building's ruin or a defective component: (1) ownership of the building; (2) the owner knew or, in the exercise of reasonable care, should have known of the ruin or defect; (3) ***15** the damage could have been prevented by the exercise of reasonable care; (4) the defendant failed to exercise such reasonable care; and (5) causation. Additionally, our jurisprudence requires that the ruinous building or its defective component part create an unreasonable risk of harm.

Because the Motion for Summary Judgment in this case was filed by the Defendants (who do not bear the burden of proof at trial), the first step in this Court's analysis is to determine whether the Defendants (as movers) have shown that there is an absence of proof on one or more of the elements enumerated above. After thorough consideration of the record and arguments made at the hearing on this motion, this Court rust find that they have not done so.

In their argument for summary judgment, the defendants focus mainly on the “unreasonable risk of harm” element explained by the Louisiana Supreme Court in the *Broussard* case cited above. More specifically, the defendants attempt to show that there is no proof to support the contention that the placement and construction of the running step and parking bumpers were unreasonably dangerous. They argue that there was no unreasonably dangerous condition, because the placement of the step vis-à-vis the parking bumpers was open and obvious to Mr. Tramuta.

Because the “unreasonable risk of harm” element was integrated into the premises liability analysis through jurisprudence, it is prudent to look to the Supreme Court for guidance about its application. *Broussard* is a particularly appropriate reference, because it is a Louisiana Supreme Court case that was decided In the last calendar year. In *Broussard*, the plaintiff was injured as the result of a misalignment between a building's lobby and elevator floors. After a three-day trial, a jury found in favor of the plaintiff, determining that the misalignment caused an unreasonable risk of harm. The Fourth Circuit Court of Appeal reversed, finding the jury's verdict manifestly erroneous. The Court held that, because the hazard was open and obvious to the Plaintiff, no factual basis existed for the jury's determination that there was an unreasonable risk of harm. The Supreme Court granted the writ application to further examine this issue.

The plaintiff in *Broussard* was a UPS driver who routinely made deliveries to the building at issue in the case. After some repairs to the roof, this building had a history of issues with its elevators. “Most significantly, the Tower's elevators would often stop in a position uneven with floors of the building. These misalignments would create an offset ***16** between the elevator floor and the building floor ranging anywhere from a few inches to several feet.” *Broussard*, 113 So. 3d at 179. On one particular delivery, the plaintiff attempted to maneuver a dolly with 6 boxes of computer paper into one of the building's elevators. Because of the misalignment between the elevator floor and the lobby floor, he stepped backward into the elevator and tried to pull the dolly over the elevation. As a result of the force necessary to move the dolly, he fell backward into the elevator wall and suffered a herniated, degenerative disc in his back.

In its discussion, the Court explained:

As a mixed question of law and fact, it is the fact-finder's role--either the jury or the court in a bench trial--to determine whether a defect is unreasonably dangerous. Thus, whether a defect presents an unreasonable risk of harm is “a matter wed to the facts” and must be determined In light of facts and circumstances of each particular case ... To aid the trier-of-fact in making this unscientific, factual determination, this Court has adopted a risk-utility balancing test, wherein the fact-finder must balance

the gravity and risk of harm against individual societal rights and obligations, the social utility of the thing, and the cost and feasibility of repair.

Broussard, 113 So. 3d at 183-184.

One prong of this risk-utility balancing test involves whether the hazardous condition at issue was open and obvious. This prong is included in the risk-utility calculus, because, if a hazard is obvious for everyone to see, the probability of an injury is lowered. However, this is only one prong of the test to determine whether a hazard was unreasonably dangerous.

... [T]his risk-utility balancing test [has been synthesized into]... a consideration of four pertinent factors: (1) the utility of the complained-of condition; (2) the likelihood and magnitude of harm, including the obviousness and apparentness of the condition; (3) the cost of preventing the harm; and (4) the nature of he plaintiff's activities in terms of its social utility or whether it is dangerous by nature.

Broussard, 113 So. 3d at 184.

With respect to the "open and obvious" prong, the Court found a reasonable basis for the jury's determination that the defect of the elevators was not open and obvious. The Court elucidated:

... I]n order to be open and obvious, the risk of harm should be apparent to all who encounter the dangerous condition .. The open and obvious inquiry thus focuses on the global knowledge of everyone who encounters the defective thing or dangerous condition, not the ***17** victim's actual or potentially ascertainable knowledge. Simply put, we would undermine our comparative fault principles if we allowed the fact-finder to characterize a risk as open and obvious based solely on the plaintiffs awareness of that risk. The plaintiff's knowledge or awareness of the risk created by the defendants conduct should not operate as a total bar to recovery in a case where the defendant would otherwise be liable to the plaintiff.

Broussard, 113 So. 3d at 188-189.

In that case, the Court applied the "open and obvious" prong of the risk-utility balancing test by considering the many documented incidents of people tripping and falling due to the misalignment of the elevators with the building's floors. If th hazardous condition were truly open and obvious to everyone who encountered it, thee would not have been nearly as many accidents.

After applying all of the risk-utility factors to the facts in Broussard, the Court held that, despite the great utility of the elevators, the risk of significant harm was likely. Finding that the risk outweighed the utility, the Court ruled that the defectiveness of the elevators presented an unreasonably dangerous condition.

At this juncture, it is appropriate to discuss how the Supreme Court's opinion in *Broussard* relates to the facts of the instant case. At present, this Court provides reasons for vacating its order granting the defendants' Motion for Summary Judgment. Thus, it is important to view the facts of this case through the summary judgment framework provided in Article 966 of the Louisiana Code of Civil Procedure. More specifically, this Court was tasked with determining whether the defendants were successful in showing that the plaintiffs do not have factual support for at least one of the elements of their claims.

Based on the text of the defendants' Motion for Summary Judgment (and its accompanying memoranda), it appears that the entire thrust of the defendants argument is that they are not liable because the hazard was open and obvious. The Motion for Summary Judgment states, "it was the plaintiffs failure to look and see an obvious hazard, which caused his fall." In the Memorandum in Support of Motion for Summary Judgment, the Defendants argue, "In the instant case, if the steps and the bumper guards were hazards, they were obvious hazards... Defendants are not liable since the steps and the bumper guards were openly visible and obvious."

***18** Assuming that the Defendants' "open an obvious" argument is correct, this argument addresses only one of the factors of the risk-utility balancing test promulgated by the Supreme Court. In order to show that the plaintiffs cannot prove the hazard was unreasonably dangerous, the defendants must balance the risk of the hazard with its potential utility. Without completing this analysis, the Defendants cannot definitively show that the plaintiffs cannot meet their burden of proof at trial. In other word though the obviousness of a hazard speaks to its reasonableness--it is not necessarily determinative.

Furthermore, this Court is not entirely convinced that the hazard was open and obvious. People in society generally encounter parking lots with parking bumpers quite frequently in the course of everyday life. There would seem to be a reasonable expectation that they would not be installed in a place where they would be easily tripped over when exiting a store. Therefore, while the placement of the parking bumpers vis-à-is the step may have been obvious, the danger Involved may not have been obvious to everyone who encountered it.

Accordingly, this Court must find that the defendants have not met their initial burden to show that they are entitled to summary judgment In this highly fact-intensive case, there are still issues of material fact which must be decided by a jury during a trial on the merits.

REASONS FOR JUDGMENT, signed in Gretna, LA, this 14th day of March, 2014.

CONCLUSION

As can be seen, the Trial Court could not have made it clearer and the Court concluded:

> Accordingly, this Court must find that the defendants have not met their initial burden to show that they are entitled to summary judgment. In this highly fact-intensive case, there are still issues of material fact which must be decided ***19** by a jury during a trial on the merits.

The Trial Court dismissed Appellee's first Motion for Summary Judgment. Then Appellee filed a second Motion for Summary Judgment, bringing the same issues, which was res judicial to the first Motion. Now, the Trial Court has issued *two* separate Motions for Summary Judgment, making the same findings and writing a six page Reasons for Judgment for its actions.

For reasons stated above, this matter should be reversed and remanded back to Trial Court for Trial.

ARGUMENT ON ISSUE FOR REVIEW NO. 2:

> THE SECOND MOTION FOR SUMMARY JUDGMENT FILED BY APPELLEES WAS REDUNDANT AND THE TRIAL JUDGE WAS NOT IN ERROR BY DENYING THE MOTION

The following was presented to the Trial Judge in the Memorandum regarding redundancy and res judicata: [10]

COMPARISON OF DEFENDANTS' TWO IDENTICAL, REDUNDANT SUMMARY JUDGMENT MOTIONS

Appellees for this Court's convenience, as presented to the Trial Court using both of Defendants summary judgment motions, will show and as can be seen, both motions are identical:

FIRST MSJ ARGUMENTS (Tr. Pg. 53)	**SECOND MSJ ARGUMENTS (Tr. Pg. 298)**

Defendants argue that Plaintiff had been at scene of incident where he fell on two or three occasions before the accident. He had prior knowledge	Defendants argue that Plaintiff had been at the scene only weeks before the accident. He had prior knowledge
For argument, Defendants use same photographs of running step and parking bumpers	For argument, Defendants use same photographs of running step and parking bumpers
Defendants argue the running step and the parking bumpers were clearly visible	Defendant argues the running step and the parking bumpers were clearly visible
Defendants argument is that risk was not unreasonable	Defendants argument is that risk was not unreasonable
Defendants argument is that the condition should have been seen by Plaintiff, and was clear and visible. That the property owner is not responsible	Defendants argument is that the condition should have been seen by Plaintiff, and was clear and visible. That the property owner is not responsible
Defendants argue there are no genuine issues of fact	Defendants argue there are no genuine issues of fact
Defendants argue and use the same facts, testimony and exhibits	Defendants argue and use the same facts, testimony and exhibits
All witnesses are the same. All witness testimony is the same	All witnesses are the same. All witness testimony is the same
All photographs are the same	All photographs are the same
Defendants argue that Plaintiff does not know how the accident happened, quoting testimony of Plaintiff, and therefore cannot meet burden of proof	Defendants argue that Plaintiff does not know how the accident happened, quoting testimony of Plaintiff, and therefore cannot meet burden of proof

20** ***CONCLUSION

Nothing whatsoever changed in evidence, exhibits or facts between the Motion for Summary Judgment and the second Motion for Summary Judgment. Appellee simply got two “bites at the apple”. The Trial Court tried to correct.

ARGUMENT ON ISSUE NO. 3:

SWORN TESTIMONY SUBMITTED TO THE TRIAL COURT CLEARLY SHOWING MATERIAL FACTS THE TRIAL COURT REFERRED TO IN PART IN ITS REASONS FOR JUDGMENT

The Trial Judge in his Reasons for Judgment reached the conclusion that there were material facts that must be resolved at Trial. The following are a few of these presented to the Trial Court.

Defendants argued that there were never any accidents involving the running step and parking bumpers, *ever*. This Court is directed, as the Trial Court was, to ***21** Appellee's argument in *both motions for summary judgment* and also Defendants shameful response in their *Answer to Interrogatories*, on May 4, 2010.

WERE THERE PREVIOUS ACCIDENTS

INTERROGATORY NO. 4:

Q. Is Defendant aware of any accident that took place where parties were using steps to enter parking lot. If your answer is yes, please provide names of the parties involved and dates of accidents.
A. There have been *no accidents* reported to our office where parties were using steps to enter the parking lot. (Emphasis added)

(Tr. Pg. 346)

After the above interrogatory was answered, the depositions of store owner Gayle Terrell and attorney Robert Bonnafons was taken in which they described accidents:

DEPOSITION OF GAYLE TERRELL

Q: Now, are you aware of any falls that occurred on the property?
A: In what time span?

Q: Well, let's say since Katrina.

A: Okay. I'm aware that two of my customers fell. And, of course, I knew about Mr. Tramuta because that was a much more serious fall. One gentleman was leaving my store with his wife and he fell exiting. Not my store but going down to the care. The other lady was leaving and she wore glasses. She fell and the glasses were in little shards of glasses and some went in her cheek. And she was a good customer. She came in and I removed shards of glasses and offered to take her to the hospital and she said her daughter would take her.

Q: You said two of your customers. The gentleman that you mentioned who fell while exiting, was that Mr. Tramuta?

A: No. Mr. Tramuta was in Jeff's when he fell.

Q: Tell me about the gentleman that you know that fell. When did that happen?

A: Probably in 2007.

Q: My understanding of this property is that at one point in time there is the landing which is where your shop is and there's a parking lot, of course, ***22** where people park to go in and out of the stores. And at one point in time there was a distance between the landing and the parking lot due to subsidence of the parking lot. Is that your recollection also?

A: Yes.

Q: And that in an effort to change the situation that was there, some steps were put in leading from the landing down into the parking lot; is that correct?

A: That's correct.

Q: Do you remember when those were put in?

A: In the vicinity of 2005.

Q: Did you have any input in terms of those steps being added?

A: No.

Q: After the steps were added to the parking lot, did you have any, was there any point in time that you complained to anyone about them?

A: I personally felt they were not laid right, not installed right. But I did not call Mr. Caplan about it.

Q: When you say personally fell it was not laid right, what led you to that feeling?

A: Well, because I had several stores in the city. I was often bringing my car in to bring transfers either to the either store or from the other stores. And it was always a problem because the embankment was was in front of the outside walkway to the store and it was not enough depth for the average feet to fit there. You had to turn your foot sideways which could, in fact, make you twist. In other words, if this a walkway that led to my store, it was under the overhang, this was the embankment that stopped the care from going forward. And this would be the space where they wanted us to park. The space right here from the embankments here wasn't deep enough I don't think for a man's foot. It was hardly deep enough for mine. I mean I have an eight and a half foot. You had to just be careful.

Q: Now, you were talking about the distance between the parking bumper and the bottom step?

A: It's the parking lot. Let's call it an embankment for less than any other reason. That's the part that stopped the car from going forward.

Q: Sure.

A: Then they had less than a foot here before you could step up.

(Tr. Pgs. 346-349)

***23** Q: Do you have any type of a sign inside your business saying beware of the parking bumpers in the parking lot?

A: No. But after this confusion started, we do not allow any lady of a certain age to exit the store without being assisted. So especially if she's carrying clothes in a bag. And I'm sure the stenographer will admit to this. When you carry out something that's hanging bag length, you have to be at least five-eight or mine to be the height you need to be to not trip on it. I'm always stepping on that. So we help the ladies.

Q: Now, tell me about the fellow that you know that fell. Can you tell me that happened? You said 2007?

A: Yes.

Q: Tell me what happened there.

A: He was an **elderly** man, he and his wife. In fact, he was the one of the survivors of the Holocaust. He's always making speeches around the city. He has since died. But he slipped and fell. And it was more of an embarrassment for him to get up. He got in his car and hurried off.

Q: Did you witness his fall?

A: Yes.

Q: How were able to do that?

A: I was outside. When they were leaving, I was giving goodbyes, et cetera....

Q: So he was standing in front of which store?

A: Front of the door of my store 3307.

Q: Did he walk with any type of aid?

A: No.

(Tr. Pgs. 346-349)

Q: The other fall that you witnessed was it Dorian Welch?

A: I think so.

Q: Did you see her fall?

A: Yes.

Q: When did that occur?

A: Truly, I don't remember the date. But I went outside right away to help her too.

Q: And explain to me what you saw.

A: What was the most dramatic part of her fall - -. The most dramatic part of her fall, she wore glasses. And when she fell, her glasses broke and some of the shards of glass went into her cheek....*The problem with that center is when you take the step down, there's not enough depth between the bumper and* ***24** *the step to get your foot in there.* [11] (Emphasis Mine)

Q: When she fell, Miss Welch, did you see her actually take the fall?
A: Yes.

Q: And where was she when she fell?

A: She was right at the point where she was going to take the step down.... It's the landing which is let's call it a sidewalk for all practical purposes. You take a step down. Everything else is on one level. *You have a step down which is between the landing and the bumper.* (Emphasis Mine)

(Tr. Pgs. 346-349)

DEPOSITION OF ROBERT BONNAFFONS

Q: Okay. Tell me, well, tell me about a fall you witnessed. When did you witness a fall?
A: I'm going to say sometime in the last two to three years. I don't recollect the date. I was exiting Jeff's Haberdashery in Metairie. I think I had purchased some clothes there. I've been a customer of Jeff's for a long time. And there's a Subway

sandwich shop right next door and as I was leaving Jeff's and walking out the door and walking towards Subway, not enter Subway but where my car was parked in the parking lot, I witnessed an **elderly** lady fall.

Q: Okay. Do you remember in terms of that strip mall, did she fall, I guess in terms of location, what store would she have been in front of. Does that make sense?

A: Subway.

Q: Subway, okay. When you witnessed her fall, was she on the, excuse me one second, the landing? In other words, the part of the concrete that leads into the store itself?

A: Partially. *She was stepping down from the landing at the time that she fell.* [12]

Q: Okay. Did you see how she fell?
A: I did.

Q: Can you describe to me what you saw?

A: Sure. I'm going to, I'm guessing that the lady was probably in her late 60's, early 70's and she and two ***25** other females had exited Subway. I just happened to be walking in their direction at the same time. I noticed them because I waited to let them pass in front of me. There was a young girl, I 'm guessing between the ages of seven and 10, and then another woman may have been in her 30's who were in front of this lady and were proceeding into the parking lot.

Q: Okay.

A: And this, the lady who ultimately fell was stepping down and there was a car parked perpendicular to the landing as you described it in front of Subway. And as she stepped down she kind of leaned onto the car and then rolled to the left and landed on the ground in the parking lot.

(Tr. Pgs. 350-351)

NO PERMIT WAS SECURED, THE CODE WAS VIOLATED, DEFENDANT REJECTED ITS CONTRACTOR'S SUGGESTION WHICH WAS AN ATTEMPT TO PREVENT HAZARDOUS ACCIDENTS

Andrew “Duke” Allen, testified his estimates were made after Hurricane Katrina (2005), and that no permits of any kind were secured, and that he made known to the owner that the 285 foot step once installed would leave little to no distance/space between the step and the parking bumpers for patrons to step on and off from the foyer to the parking lot. He also recommended for the 285 foot step to painted yellow, and Defendants' rejected:
1. Latter and Blum acted as general contractor and had responsibility of securing permission and permits to construct a 285 linear ft. running step over the pre-existing sidewalk (Tr. Pgs. 89, 91-93, 351,352).

2. No permits were ever produced by Defendant, Latter and Blum, to Pre-Cast Concrete Step Company, Inc., (Tr. Pgs. 91-93, 351, 352).

3. Latter and Blum requested bid for installation/construction of a running step, along the perimeter of building sidewalk, on June 27, 2005 (Tr. Pgs. 91-93, 351,352).

4. Pre-Cast Concrete Step Company, Inc., submitted first bid proposal (Tr. Pg.91-93,182-190) to install running step with height of 6-8” and depth of 14”, along the perimeter of building sidewalk, (Tr. Pgs. 91-93, 182-190).

5. Latter and Blum rejected first bid, as too costly, and thereon requested Mr. Allen to reduce his price by reducing the linear footage to 285 linear ***26** ft. (Tr. Pgs. 91-93, 182-190).

6. As requested by Latter and Blum to reduce the linear footage to 285 linear ft., Pre-Cast Concrete Step Company, Inc., submitted second bid proposal, to install running step with height of 6-8” and depth of 14”, at 285 linear ft., painting the face yellow, to make more visible (Tr. Pgs. 91-93, 180-190).

7. Latter and Blum rejected to have the running step painted yellow and rejected second bid proposal and thereon sought another price reduction and bid proposal (Tr. Pgs. 91-93, 182-190).

8. Pre-Cast Concrete Step Company, Inc., submitted third bid proposal, via reducing amount of concrete to be used for the running step with new height to be constant 5”, instead of 8”; and new depth to be 13” instead of 14”. Latter and Blum accepted third bid proposal on July 20, 2005, in the amount of $4,916.00 (Tr. Pgs. 91-93, 182-190).

9. Mr. Allen testified that before the running step was added, there existed parking bumpers that were 36” between the parking bumpers and the foyer step (Tr. Pgs. 91-93, 182-190).

10. That after the running step was added, the distance between the parking bumpers and the running step was reduced from 13” to 11”.

11. Mr. Allen was asked why the parking bumpers were not moved, and he responded, that he had a verbal discussion with the property manager, regarding moving the parking bumpers further out. The property manager informed him that the property owner did not want to incur further costs (Tr. Pgs. 91-93, 182-190).

CONCLUSION

As the Trial Court stated in the Reasons for Judgment (Tr. Pgs. 461-466), there are issues of material facts that must be resolved in Trial Court. These three witnesses' testimony are devastating to Appellee.

Their contractor's testimony is breathtaking to negligence. He wanted the bumpers moved back to safe stepping distance from where he had moved the step. His client said “no 11” is enough stepping room. Moving it to code of 36” is to expensive”.

It is argued that the Trial Judge was quite aware of there testimonies when he corrected his error and rescinded the Judgment.

***27** ARGUMENT ON ISSUE NO. 4:

CAN A TRIAL COURT REVERSE ITS ERROR AS OCCURRED IN THIS MATTER, AFTER DISCOVERING THE ERROR WHEN APPELLANTS FILED A REQUEST FOR WRITTEN REASONS

FACTS AND PROCEDURE

The second Motion for Summary Judgment subject of this appeal was signed on February 10, 2014 (Tr. Pg. 427). Two days later on February 12, 2014 Plaintiffs filed a Request for Written Reasons (Tr. Pg. 428).

It can be assumed by this Court that the Trial Court after receiving a Request for Written Reasons two days after the Judgment thereon began preparation of the Reasons for Judgment. That is when the Trial Court discovered its error and thereon issued Judgment rescinding its Judgment of dismissal. It can be assumed that the Trial Court continued its evaluation and research for purposes of explaining why it corrected its error.

The Trial Court then for the record placed in writing in six pages Reasons for Judgment (Tr. Pg. 446), why it rescinded its Judgment.

ARGUMENT

It would seem that an appeal court would welcome a Trial Judge correcting its error after Request for Written Reasons was filed. This certainly would help clear the Appellate Court docket somewhat. However, most Trial Judges would not have gone through the time and effort of this Trial Judge in reversing and preparing a six page Reasons for Judgment.

Defendant raises issue of jurisdiction which has created a needless and senseless appeal unless this Court could believe the Reasons for Judgment (Tr. Pg. 446) is flawed.

The *Judgment* (Tr. Pg. 427), was rendered on February 10, 2014. Two (2) days

[Note: Page 28 missing in original document]

***29** *authority to order a new trial on its own motion, even afer the expiration of the delay for filing a motion for new trial...”*

In case at Bar, Plaintiffs filed *Request for Written Reasons of Judgment*, two days after the trial Court rendered its *Judgment*, interrupting the seven days allowed to file for a new trial. At Bar, the trial Court did the same thing as in *Jabbia*. Plaintiffs filed for Written Reasons, and the Court's response would provide a basis for any new trial motion.

Defendants cite *Tannehill v. Tannehill*, 226 So.2d 185 (La. App. 3 Cir, 1969). However, *Tannehill* is not remotely related to the current case at Bar in facts. In *Tannehill*, the husband, in a domestic matter, sought to annul marriage in a different jurisdiction.

CONCLUSION

Jurisdiction remains with this Court and jurisdiction has been in this Court. However Defendants did not wait for this Court's Memorandum, which was filed on March 14, 2014, before filing of subject motion. Plaintiffs did not file for new trial, instead Plaintiffs sought on February 12, 2014, *Request for Written Reasons for Judgment* rendered on February 10, 2014. Jurisdiction remained with the trial Court and still remained with the trial Court.

The trial Court, in acting on Plaintiffs motion, thereon, on its own motion, vacated the *Judgment*, and issued its reasons on March 14, 2014. Defendants should have waited for this Court to render its Memorandum. Defendants *Motion for Nullity and Motion to Strike* was without merit.

This matter should be remanded for Trial as stated by the Trial Judge in the Reasons for Judgment.

***30** ARGUMENT ON ISSUE NO. 5:

DID APPELLEE WAIVE ARGUMENT REGARDING TRIAL COURT' S JURISDICTION BY FILING MOTION IN TRIAL COURT TO STRIKE RATHER THAN PURSUE ON APPEAL?

Appellees contend the Trial Court had no jurisdiction after it signed the original Judgment (Tr. Pg. 427) and could not thereon rescind this Judgment (Tr. Pg. 432) and issues Reasons for Judgment (Tr. Pg. 446).

The Appellees filed Notice of Intent to Apply for Writs to this Court (Tr. Pg. 443). This matter was to be appealed to this Court because Appellees took the position the Trial Court has last jurisdiction.

However, Appellees then decided that the Trial Court in fact has jurisdiction and on March 10, 2014 (Tr. Pg. 433) filed a Motion in the Trial Court to nullify and/or strike the Judgment subject of this matter. The logical question to be considered is why Appellees filed the Motion to Quash and Strike in a Court that had no jurisdiction.

CONCLUSION

To Appellants, this is a waiver to Sate Court jurisdiction and if that is the case, then the Trial Court's Judgment of February 27, 2014 (Tr. Pg. 432), rescinding its Motion of February 12, 2004 (Tr. Pg. 430), should stand as well as the Reasons for Judgment (Tr. Pg. 446).

IX. *CONCLUSION OF RELIEF SOUGHT*

Appellant prays that this Court reverse the ruling of the Trial Court in this matter and remand this matter back to Trial Court. The Trial Court specifically stated in its Reasons for Judgment that “Summary judgment is appropriate only when ... there is no genuine issue as to material fact”. The Trial Court Judge erroneously granted Appellee's Motion for Summary Judgment knowing that there was still issues ***31** as to material fact. The Trial Court concluded its Reasons for Judgment stating, “In this highly fact-intensive case, there are still issues of material fact which must be decided by a jury during a trial on the merits.”

The Trial Court contradicted itself by granting the Motion for Summary Judgment, as the Trial Court ignored its own research and findings. Therefore, this matter should be remanded back to the Trial Court and a trial on the merits shall be had as stated in the Trial Court's Reasons for Judgment and by the records in this matter.

Footnotes

1 Per the record, the photographs were contained in a separate box from what Appellant received from this Court as the record (Tr. Pg. 360). The space left for the step would trap a shoe as happened with Appellant.

2 Defendants subcontractor's deposition was taken. Mr. Allen testified that he secured no permits and wanted the parking bumpers that Plaintiff fell over moved back, to provide for more space between the newly installed running step and the parking bumpers, and to paint the running yellow. Defendants refused as it was too costly.

3 The parking bumpers were originally designed with a space of 36 inches between the foyer and the parking bumpers. In construction of the 285 linear foot running step, the landing was reduced to 11 inches.

4 Eleven inches (11”) is negligence, and not enough space between landing and parking bumpers. Thirty-six inches (36”) should have been provided, according to the ASTM F1637 (Standard Practice for Safe Walking Surfaces). The subcontractor offered bid, but-Defendant, Latter and Blum did not want to incur additional costs.

5 This establishes knowledge of pending danger and a refusal to correct the hazard...triggering strict liability, as pled.

6 Before the running step was installed, the landing area and parking bumpers conformed to safety standards.

7 Appellee testified that no accidents of any kind ever occurred. This is shown also in the interrogatory answers infra.

8 None of this squared with Appellee's interrogatory answers that no accidents ever took place.

9 Both Mr. Bonnaffons and Ms. Terrell's depositions were taken by Defendants, after this Court dismissed Appellees first summary judgment motion. Now the Trial Judge has before him a second summary judgment motion with the remarkable testimony of the store owner and of the attorney witness Bonnaffons.

10 It was also argued that Appellee took Writs previously to the Fourth Circuit arguing the same identical issues and the Writ was denied by the Fourth Circuit.

11 This is same as the testimony of Defendants subcontractor, Andrew “Duke” Allen, and of Plaintiffs' safety expert, Michael Frenzel.

12 This is the same landing and space that was reduced from 36 inches (36”) to eleven inches (11”), by the installation of the new running step, and also the same landing that Defendants subcontractor wanted to move the parking bumpers back to provide a space to step.

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